

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC-08464

BARNSTABLE COUNTY

COMMONWEALTH
Appellee

v.

CHARLES ROBINSON
Defendant-Appellant

ON APPEAL FROM A
JURY TRIAL IN THE
BARNSTABLE SUPERIOR COURT

BRIEF FOR THE COMMONWEALTH

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COMMONWEALTH'S BRIEF

ISSUES PRESENTED

I. WHETHER VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE COMMONWEALTH, THE EVIDENCE WAS SUFFICIENT TO CONVICT THE DEFENDANT OF FIRST DEGREE MURDER FOR THE THEORIES OF EXTREME ATROCITY AND CRUELTY AND DELIBERATE PREMEDITATION.

II. THE DEFENDANT WAIVED HIS CLAIM THAT THE COURT VIOLATED HIS RIGHT TO A PUBLIC TRIAL WHEN HE FAILED TO OBJECT DURING THE VOIR DIRE, HOWEVER EVEN REVIEWING THE CLAIM, IT DID NOT RISE TO A SUBSTANTIAL LIKELIHOOD OF A MISCARRIAGE OF JUSTICE, AND INDIVIDUAL VOIR DIRE OF THE ENTIRE VENIRE WAS NOT REQUIRED.

III. WHETHER EVIDENCE THAT LETT AND ELLIS DROVE THE VICTIM TO THE DEFENDANT'S HOUSE IN FALL RIVER TO PURCHASE DRUGS WAS ADMISSIBLE TO SHOW MOTIVE, WHERE HOURS PRIOR TO THE MURDER THE DEFENDANT WAS ANGRY THAT THE VICTIM'S CAR WAS NOT REGISTERED AND UNABLE TO BE OPERATED.

IV. WHETHER THE COMMONWEALTH'S CLOSING ARGUMENT WAS PROPER, WITHIN THE PERMISSIBLE LIMITS OF CLOSING ARGUMENT, DIRECTLY RESPONDED TO THE DEFENDANT'S CLOSING ARGUMENT AND DID NOT ARGUE FACTS NOT IN EVIDENCE.

V. WHETHER THIS COURT SHOULD NOT EXERCISE ITS EXTRAORDINARY POWER UNDER G.L. c. 278, §33E TO REVERSE OR REDUCE THE VERDICT OF MURDER IN THE FIRST DEGREE BECAUSE THE JURY'S VERDICT WAS CONSONANT WITH JUSTICE.

STATEMENT OF THE CASE

1. The defendant was indicted by a Barnstable County Grand Jury on May 1, 2000 for one count of "Murder," G.L. c. 265, §1; and one count of "Assault and Battery with a Dangerous Weapon," G.L. c. 265, §15A(a).¹

(R.A.9)

2. The defendant was arraigned in Barnstable Superior Court on May 2, 2000 where he entered pleas of not guilty. (R.A.9)

3. Defense counsel filed various pretrial motions.

4. On August 14, 2000, the defendant was tried before a jury and O'Neill, J., in the Barnstable Superior Court. (R.A.9-10)

5. On August 21, 2000, the defendant was found guilty of "First Degree Murder," on the theories of

¹ Citation format will be as follows: to the transcript as "(vol/pg)," to the Record Appendix as "(R.A.#)," to the defendant's brief as "(D.B.#)," and to the Supplemental Appendix as "(S.A.#)."

deliberate premeditation and extreme atrocity and cruelty, and found guilty of "Assault and Battery with a Dangerous Weapon." (R.A.9-10)

6. The defendant was sentenced to life without the possibility of parole on the conviction for "Murder."

The conviction of "Assault and Battery with a Dangerous Weapon" was placed on file. (R.A.10)

7. The defendant filed a timely notice of appeal. (R.A.11)

8. The defendant's appeal has been stayed for approximately eighteen years during which defense counsel has pursued and filed various motions including two Motions for a New Trial² and motions addressing the defendant's competency. (R.A.11-20)

STATEMENT OF FACTS

Leticia Rose had been living with her boyfriend, Eddie Figueroa, for four months at a condominium at 47 Union Wharf Road in Dennisport, Massachusetts.

(2/142) On the evening of February 24, 2000, Rose returned home from work. (2/142) She left shortly thereafter and went to Marshall's in Dennis. (2/142) She returned home at 6:00 P.M., and she noticed the

² At the time the Commonwealth's brief was drafted, the defendant still has not had a final hearing on the Motions for a New Trial.

defendant's two-toned cream Lexus parked in the driveway, with "A Smooth Edition" written on the side. (2/142)

She saw the individual she knew as "Smooth," who was also known as Charles Robinson, the defendant. (2/135) The defendant said to her, "thank you for letting me steal time from Eddie" to "find out where his head was at." (2/148) He was wearing dark clothes. (2/185)

Rose got in the shower that night at 7:25 P.M. (2/148) She heard Figueroa's brother, Juan Serano, also known as "Sisco," enter the apartment with his girlfriend, Jennifer Kimball. (2/193, 2/172) Serano gave Figueroa money for marijuana. (4/712) Figueroa introduced him to Robinson and there was no tension. (2/218) Serano then left with Kimball. (2/193)

While Rose was in her bedroom, she overheard a conversation between the defendant and Figueroa in the living room. (2/150) She heard the defendant say, "that's why I told you to get your car on the road," and "I got to go." Figueroa replied, "sorry, dog," and said, "I didn't mean to offend you." (2/152) The defendant said, "I should slap your face. I should just punch you in the mouth." (2/153) Rose left the

apartment sometime that evening after 9:00 P.M.

(2/157)

Charles Ross lived with his mother in the condominium below Rose. (2/224) Around 10:15 P.M., he heard three bangs and then three more bangs. (2/229) His mother came in the room and said "did you hear that?" (2/231) She looked outside and said "I don't see nothing." (2/237) Ross had observed the defendant and Figueroa on the condominium complex in the days prior to the homicide. (2/239) He saw the defendant's Lexus parked in the parking lot on the dates preceding and on the date of the homicide.

(2/239-240)

Rhonda McMahon lived next door. (2/264) On the evening of February 24, she was watching television when she heard loud bangs. (2/265-266) She went to see what the noise was, and sat back down, heard more bangs, and got up again. (2/266) She heard voices in the stairwell leading to the Ross's apartment. (2/268)

McMahon recalled seeing a cream-colored Lexus parked in the apartment complex parking lot a few days before the homicide. (2/266) She did not leave her house on February 24, 2000, so she could not say if she saw the car that day. (2/266)

Marie McGowan lived across the street from the condominium complex. (2/254) She was home on the night of February 24, 2000. (2/254) At approximately 10:10 P.M. she heard a car going "very fast" down Union Wharf Road. (2/254)

Wayne Phillipo lived in condominium 2W. (2/259) On February 24, 2000, he left his house for work at approximately 12:00 P.M., and returned home around 4:00 A.M. on February 25. (2/259) He informed the police that he observed a white Lexus in the parking lot when he left for work at noon. (2/261)

Rose returned home after 10:30 P.M. (2/159) The defendant's car was not in the parking lot. (2/159) She found Figueroa dead on the living room floor. (2/161) He was still seated in the arm chair, except it was tipped over on its back. (2/161) His hands were on his lap, and his head was partially under an end table. (2/164, 196)

Rose noted the phone in the living room was off the receiver. (4/673) She touched the victim and put the phone back on the receiver. (4/673) She went into the kitchen and called the police. (4/673)

Officer James Sullivan of the Dennis Police Department responded. (2/102) Sullivan moved the

tipped-over chair to check the victim's pulse.

(2/107) Sullivan did not observe signs of a break in.

(2/116) There were no shell casings at the scene.

(2/119)

Massachusetts State Trooper Joseph Condon of the Crime Scene Services responded to the scene at approximately 11:45 P.M. (3/343) He took photographs of the scene, the victim, the autopsy, and the x-rays containing the locations of the slugs. (3/346) He explained that the blood spatter was contained to the underside of the coffee table that was by the victim's body. (3/378)

Dr. James Weiner of the Medical Examiner's Office conducted the forensic autopsy of the victim on February 24, 2000. (4/579) Dr. Weiner noted that Figueroa was in excellent health for a 24 year old male. (4/579) He recovered five spent projectiles. (4/579) Dr. Weiner noted that there were seven gunshot wounds on the victim's body. (4/580) There were wounds to the left temple, left eyelid, right upper chest, back of left forearm, left lower ankle, and two on the back of his right hand, injuring the hand and a finger. (4/580) Dr. Weiner noted that there were five projectiles recovered but seven

wounds, as the projectiles passed through the hands and into his body. (4/580) The wounds to the head were considered "rapidly fatal" (4/581) The wound to the head was consistent with the shooter standing over the victim, as the victim was already lying on the ground. (4/545, 587) The gun was likely between six inches and three feet from the victim's head when it was fired. (4/566-570) The time of death was consistent with 10:15 P.M. (4/591-593)

Chemist Daniel Pratt of the Criminalistics section of the Crime Laboratory responded to the scene. (4/597) A red-brown stain on the chair, the red-brown stains by the victim's head, and the spatter on the wall tested positive for the presence of blood. (4/599) The phone in the kitchen tested positive for the presence of non-visible blood. (4/599)

Pratt also conducted testing on items in the days after the homicide. On February 28, 2000, four days after the homicide, the police received clothing purported to belong to the defendant. (4/603) The clothing tested negative for blood. (4/603) The Lexus was tested on February 27, 2000, and it tested negative for the presence of blood. (4/603-604)

Trooper Michael Arnold of the State Police was assigned to the Firearms Identification Section at the Crime Laboratory and he attended the autopsy and examined the lead projectiles. (4/624) The five projectiles were of the .38 caliber class. (4/625) The projectiles had similar rifling characteristics and of the same caliber class, which led him to believe they were fired from the same firearm. (4/626) Due to no spent jackets being recovered, Arnold believed the projectiles were fired from a .38 special or a .357 magnum revolver. (4/631)

Monte Gilardi, a Sergeant at the Massachusetts State Police, was assigned to the Crime Scene Services Section. He responded that evening to the crime scene. (4/633) He lifted fingerprints from surfaces around the house. (4/633) None of the fingerprints matched the defendant. (4/634) Two of the fingerprints matched Figueroa. (4/635)

Fall River Police Officer Bruce Tavares was at roll call on the evening of February 24, 2000, when he was informed of a homicide on Cape Cod. (3/525) Tavares learned that the suspect was driving a cream and white colored Lexus. (3/526) He recalled that he stopped a vehicle with that description three months

earlier. (3/526) The driver was a black male who told the officer that he had just left his girlfriend's house on Haffards Street. (2/527) Tavares drove to the Haffards Street area, searched the block, and did not observe the car in the area. (3/530)

Cellphone Evidence and Subsequent Investigation

Sergeant James Plath of the State Police and a Dennis Police officer traveled the distance from Dennisport to Brantley's house at 228 Haffards Street, Fall River. (5/776) They drove the speed limit and tracked time and mileage. (5/776-777) The trip was completed in in 59 minutes and 48 miles. (5/777)

The Commonwealth introduced the defendant's cell site location records at trial ("CSLI"). The level of technology utilized in 2000 indicated when a cellphone made a telephone call to another individual, as it connected to a tower for that phone call. (4/690) At 11:29 P.M. the defendant's phone accessed a tower in Mattapoisett, when he called his mother, Pauline Robinson. (5/848) At 11:32 P.M. the defendant called Melissa Marchesiani, and the phone accessed a tower in New Bedford. (4/673, 675). At 11:34 P.M. the phone accessed a tower in New Bedford, and at 1:40 A.M. the

phone used a tower in Fall River, and again a tower at 1:41 A.M. in Fall River. (4/699)

Melissa Marchesiani of Middleborough was in a relationship with the defendant for eleven years.

(4/672) They had three children together. (4/672)

she recalled that on February 24, 2000, she did not see the defendant at all that day. (4/673) The defendant called her that evening at 11:30 P.M.

(4/673) She knew that he called her from his cellphone because she heard static on the line.

(4/673-674) She talked to him for approximately ten minutes. (4/674)

Shalonda Brantley, "Mocha," the defendant's girlfriend in February of 2000, testified at the trial and at the Grand Jury. (3/460) She lived at 228 Haffards Street in Fall River. (3/460)

She saw the defendant on February 24, 2000. (3/461) He was on his cellphone when he came home that evening. (3/461) He was wearing black jeans, black, jacket, black boots, and a black cap which is what Rose observed him wearing before she left her house. (3/476)

Brantley initially told the police that she went to get him on the evening of February 24 in

Middleborough at Marchesiani's house. (3/463) She told police she took a cab to her house, and drove back in the white Lexus. (3/463) However, she told police that this statement was not true and the defendant drove the white Lexus to her house that evening. (3/464)

Brantley testified that she did not know what time the defendant drove to her house that evening. (3/465) On the morning of February 25, the defendant's mother called him early in the morning, roughly 7:00 A.M. (3/478) The defendant said, "I'm all right, mom. I'm all right." (3/478) The defendant's mother called again, and Brantley was wondering what was going on. (3/478) The defendant said, "I was here last night, right?" and Brantley replied, "yeah." (3/479) The defendant then said, "no, I was here last night." Brantley replied, "yeah," and the defendant told her he arrived home at 8:00 P.M. (3/479) Brantley told this time to investigators only because the defendant told her to. (3/465) She stated it was also possible he came home at 11:00 P.M. or 12:00 A.M. that evening. The defendant's mother called back again that morning. The defendant told Brantley that some people were

questioning his mother about something that happened on the Cape. (3/482) Later that afternoon, Brantley drove the defendant to the Fall River Police Department. (3/486) Robinson would have marijuana in the apartment, and sell it to individuals. (3/498)

Brantley told the grand jury that she went to Stop and Shop at 9:00 P.M. to buy a pineapple. She drove the Saturn that the defendant purchased for her. (3/467) The defendant was home when she left for the store. The white Lexus was parked by the apartment. When she returned, the Lexus was in the same spot. She told the police about the Stop and Shop trip, and they went to the store to pull surveillance video and confirm she was there. She then went, on her own volition, to the Stop and Shop store to find the video and give it to the District Attorney to corroborate her story. She told the grand jury, however, that she never went to the store to get the video.

The next morning, the defendant's mother called Marchesiani. (4/676) The defendant called Marchesiani at roughly 9:30 A.M. on the morning of February 25, 2000. He asked her to check something on the internet for him. (4/676) Marchesiani did not

mention the subject of the call with his mother.

(4/677)

Detective Sergeant Martin Murphy of the Dennis Police Department, and Sergeant James Plath of the Massachusetts State Police drove on March 24, 1990, from 57 Union Wharf Road to Sholanda Brantley's home, 228 Haffards Street, Fall River. (5/777) They arrived there in 68 minutes, and the one-way trip was 58 miles. (5/777) They also drove from 57 Union Wharf Road to Mattapoisett, and the trip was in 59 minutes and 48 miles. (5/777) Murphy identified a map showing the cellphone towers located in Mattapoisett, New Bedford, Fall River, and South Yarmouth. (5/778)

Testimony of Daniel Lent and Michael Ellis

Daniel Lent was a friend of the victim, and he learned on February 25, 2000 that Figueroa was shot. (4/642-643) On February 19, 2000, he drove Figueroa to Fall River. (4/647) Figueroa had called him and said that he was "having a hard time getting a ride," and asked for a ride to Fall River. (4/647-648) Lent had driven him to Fall River in the past. (4/648) In the dates preceding the murder, Lent stopped giving Figueroa rides to Fall River. (4/648)

Lent and Figueroa called the defendant on the ride to Fall River. (4/651) Lent drove to an apartment, and the defendant answered the door. (4/651) Lent recognized the defendant. (4/651)

Eddie and Lent entered and sat down at the kitchen table. (4/652) The defendant's girlfriend, Mocha, whom Lent had met previously, was lying on the bed. (4/655) Lent observed the defendant wearing a t-shirt and pants, with a gun on his waistband. (4/657) The gun had a medium colored brown handle, a cylinder, and a black metal stripe. (4/658-659) Lent knew the difference between a revolver and an automatic handgun, and believed it to be a revolver. (4/659)

Michael Ellis spoke with police on February 25, 2000. (2/299) He was friends with the victim for a few years. (2/299) Ellis recalled going to Fall River with Figueroa one to two weeks prior to the murder. (2/301) They went to Fall River to buy marijuana. (2/301-304) He drove because Figueroa's car was not registered. (2/304) Ellis saw Figueroa go into a building, and then exit the building with the defendant. (2/304-306) Figueroa gave Ellis some marijuana to sell. (2/306) Ellis did not know the

address of the house, but was able to identify it from photographs. (2/307-309)

Ryan Ferguson

The defendant's theory was that Ryan Ferguson murdered Figueroa. (2/100-101) In February of 2000, Leah Moore was living with her boyfriend of a month, Ryan Ferguson, her friend Mindy Beauleau, and their children, at 29 Center Street in Dennisport. (3/400)

On February 23, 2000, Leah, her young son, Ryan Ferguson, Sisco, Mindy, Mindy's son, and a few other friends were at Moore's house. (3/381) Figueroa and the defendant stopped by around 5 to 6 P.M. (3/383) Moore and Ferguson had never met the defendant before. (3/383-384, 504) The defendant and Figueroa stayed at her apartment for fifteen to thirty minutes. (3/384)

Figueroa called Moore that evening, and said "yo, my boy wants to kick it with you. He wants to know if you're down with it. I should be letting my boy tell you this." (3/386) The defendant then took the phone and said to Moore, "I really like you. I would like to hook up with you. If you and your man are serious and together, then I'll lay off. But if you want, I would like to get to know you." (3/385) Moore did not respond, and she had an incoming call. (3/388) She

did not get back on the phone, as she did not want to talk to the defendant. (3/388) She went in her room with Ferguson. (3/388-389)

Around midnight, the defendant and Figueroa returned to her apartment. (3/389) Moore could see them sitting in the kitchen with the other individuals at the house. (3/389) The defendant asked Moore's friends, "what's up with your girl?" (3/389) Ferguson told Moore that if the defendant did not stop talking about her, he was going to say something to him. (3/389) The defendant continued, so Ferguson went in the kitchen and asked him, "what's the deal?" (3/389)

Ferguson looked at the defendant and Figueroa, and then Figueroa stood up and "sucker punched" Ferguson. (3/389, 504) Ferguson and Figueroa started fighting. (3/390) Ferguson did not realize that Figueroa and the defendant were the individuals from the phone call earlier that day. (3/504) The defendant was standing at the door watching the fight, which moved into the bedroom. (3/390) The defendant said, "we can take this outside." (3/390) The defendant also said for Figueroa to "chill out" and "lets get out of here." (3/512) The group went outside, and the defendant and Figueroa left. (3/390)

Ferguson called his friend Columbus "Rio" Jones, and asked him to bring an "SK," a type of automatic rifle. (3/506) Rio did not bring him a gun. (3/507) Ryan and Leah then went to bed. (3/509)

On February 24, 2000, Ferguson visited Maritza Samano at the Huntsman Motor Lodge before 8:00 P.M. (3/434-435) She was the mother of Ferguson's two year old child. (3/435) Moore and Ferguson's friend "Mario" came over that evening. (3/437) Samano recalled that Moore and Mario left, and she received two calls that evening from her friend Katie McGuinness, at 8:00 P.M. and 11:00 P.M. (3/437) McGuinness testified that she heard Ferguson that evening during both phone calls. (3/449) Samano went to bed at 8:30 P.M., but stayed up and watched television. (3/441) Samano fell asleep at midnight, and Ferguson was still at her house. (3/441) Ferguson left the next morning, and Moore picked him up. (3/441)

They went back to Moore's apartment, and Moore received a call from Figueroa's sister, Sonia. (3/396-398) Sonia spoke with Moore's roommate and the victim's brother, Serano. (3/397) Sonia came to the apartment and told Serano that Figueroa was dead.

(4/715) Both Sonia and Serano left. (4/715) About half an hour later, Serano called Ferguson and asked him if he shot Figueroa. (3/398) Sisco asked Figueroa, "hey, did you do anything about it?" and Ferguson replied, "no, why?" (3/509-510) Sisco cried, saying that his brother Eddie had been shot and killed. (3/509-510) Ferguson denied shooting the victim, saying it was coincidental. (4/716)

March 28, 2000, Barnstable House of Correction

On March 28, 2000, Barnstable house of correction inmate Frank Garcia had an altercation with the defendant. Garcia told the defendant that he did not want him in his cell anymore. (4/728) The defendant was not washing, the room was smelly, and the defendant was urinating "all over the place." (4/729) Garcia talked to George Washington, a corrections officer, and asked to be moved to another room. (4/730) Washington had Garcia moved to a different cell. (4/725) The defendant told Garcia that he would put ten dollars in his canteen if he cleaned up the room for him. (4/731)

Garcia yelled at the defendant, "you can't kill me, you don't have a gun." (4/733) The defendant stated, "yeah, that's what the other guy thought."

(4/733) Garcia picked up a mop or broom handle and held it up, as if he was going to hit the defendant.

(4/733) The altercation stopped. (4/733)

William Campbell was an inmate with the House of Correction in Barnstable. (4/738) On March 28, 2000, Frank Garcia was moved into his cell. (4/738)

Campbell overheard the argument, and heard the defendant say to Garcia, "I'm going to kill you."

(4/739) Garcia said, "[n]o you're not, because you don't have a gun." (4/739) Campbell heard the

defendant say, "Mr. Figueroa didn't think that

either." (4/739) The defendant turned around, saw

Campbell watching the altercation, and then started screaming, "you bitch, you bitch, you bitch," at

Garcia. (4/740) Pasquarelli and Williams were not around to hear this altercation. (4/743)

The Defendant's Case

Columbus Jones, who was also known as "Rio" or "Mario," testified on behalf of the defendant. Jones resided at the Barnstable House of Correction. (5/787)

He was friends with Ferguson. (5/788) He lived in

Swan Pond Village in South Yarmouth, and rented a room from Jennifer Wormsley. (5/788) He lived in the room

with his girlfriend, Maria Morris. (5/788)

On February 23, 2000 he received a call from Ferguson at approximately 10:00 P.M. (5/789) Ferguson asked Jones for an "SK," which is a type of machine gun. (5/788)

The next day, February 24, 2000, Jones was with Sisco and "Jen," and they went to Ferguson's house. (5/793) They left his house and went to the Huntsman Lodge. (5/799) Next, the group went to Jones house in Swan Pond Village, and dropped off Jones. (5/799) At some point that evening, Jones spoke with his landlady, Jennifer around four in the morning. (5/800, 807) She had just returned from delivering papers for the Cape Cod Times. 201 As a result, he called Leah's house in Dennisport early in the morning. (5/800) He did not talk to Ferguson, and was told that he was at a hotel. (5/802) Jones was upset and thought that Ryan was shot. (5/802) Ryan called him later that day. (5/804)

David Pasquarelli, Anthony Pina, and Jonathan Williams testified for the defendant. They resided at the Barnstable House of Correction on March 24, 2000. (5/812, 817, 823) They observed the "altercation" between the defendant and Garcia. (5/812) The defendant and Garcia argued over the cleanliness of

the jail cell. (5/818) Garcia grabbed a toilet cleaning brush and shook it over his head at the defendant, until other inmates broke up the fight. (5/815, 826)

Andrade Abrude testified that he lived at Haffards Street in Fall River. He saw a Lexus on occasion at 228 Haffards Street. (5/831) He stated that on February 24, 2000 he observed the white Lexus in the driveway. (5/833) However, on cross-examination, he stated that he was not 100 percent sure and he "told [the police] that I wasn't that much sure, but I believe his car was there." (5/842)

Massachusetts State Trooper Kimberly Squier responded to the scene of the homicide that evening at 11:20 P.M. (5/749) Several troopers and Dennis police officers were at the scene, along with crime scene services. She interviewed several individuals over the next few days. On February 29, 2000, they learned of the Ryan Ferguson fight. (5/751) The police conducted interviews of all the individuals in the apartment that evening. (5/751)

The police spoke with Pauline Robinson, the defendant's mother, on the morning after the homicide. She received a phone call the night of the murder from

her son, the defendant. (5/848) The defendant asked her if Melissa was there. (5/848)

The following day, the police knocked on her door at 6:30 A.M. (5/842) She spoke with Trooper Burke. She called the defendant after she talked to the trooper, and told him the police were concerned if he was okay. (5/854) Trooper Burke asked Pauline to get in touch with her son. (5/855) She told the defendant that the police wanted to talk to him (5/856)

The defendant had telecommunications professional Paul Daubitz testify regarding the CSLI. (5/857) He explained that if one cell tower was "saturated" with calls at its capacity, the calls would not go to that tower. (5/872)

SUMMARY OF THE ARGUMENT

1. Viewing the evidence in the light most favorable to the Commonwealth, the evidence was sufficient to support the defendant's conviction of first degree murder under the theories of deliberate premeditation and extreme atrocity and cruelty. The defendant was angry with the victim. The defendant waited until he was alone with the victim, and shot the victim multiple times in the head and abdomen. The cellphone

evidence shows the defendant leaving Cape Cod and heading towards Fall River. (Pp.32-38)

2. The right to a public trial waived by counsel's actions where he assented to the voir dire in the judge's chambers without objection. Even if counsel's actions did not constitute a waiver, the defendant has not suggested any harm as a result of the procedure that would give rise to a substantial likelihood of a miscarriage of justice. (Pp.38-50)

3. The evidence of Lett and Ellis driving the victim to Fall River in the weeks leading up to the murder to purchase drugs from the defendant was properly admitted. The evidence established motive, where the defendant was angry with the victim as his car was not registered so he could not drive himself. The judge instructed the jury that this evidence was not to show propensity on behalf of the defendant. (Pp.51-55)

4. The prosecutor's closing argument was based on facts and reasonable inferences from the evidence based in trial. The defense attorney did not object to the closing argument. The prosecutor's statement that the victim was a bodyguard for the defendant was based on the reasonable inference from the facts. Further, the prosecutor's statement that the victim

went to Fall River to get drugs from the defendant was based in fact. The judge instructed the jury that closing arguments are not evidence. (Pp.55-59)

5. Because there were no errors during trial, the defendant is not entitled to a new trial under G.L. c. 278, §33E. (Pp. 59-60)

ARGUMENT

I. VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE COMMONWEALTH, THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE DEFENDANT'S CONVICTION OF FIRST DEGREE MURDER FOR THE THEORIES OF EXTREME ATROCITY AND CRUELTY AND DELIBERATE PREMEDITATION.

A. Standard of Review.

The defendant contends that the trial judge erroneously denied his motion for a required finding of not guilty. (D.B.20) The defendant moved for a required finding of not guilty at the conclusion of the Commonwealth's case. (2/782) He also moved for a required finding of not guilty at the conclusion of all evidence. (5/887) Therefore the issue is preserved for appellate review. *Commonwealth v. Webster*, 480 Mass. 161 (2018).

B. Viewing the evidence in the light most favorable to the Commonwealth, the evidence was sufficient to support the defendant's conviction of first degree murder by the theories of extreme atrocity and cruelty and deliberate premeditation.

The evidence and reasonable inferences made therefrom support the defendant's conviction of first degree murder under the theories of deliberate premeditation and extreme atrocity and cruelty. (6/975) The defendant argues that there was no eyewitness to the shooting, and "the identification of the shooter was left to speculation." (D.B.22)

In assessing the defendant's claims, this Court applies the well-established standard set forth in *Commonwealth v. Latimore*, 378 Mass. 617, 676-677 (1979). This Court must decide "after viewing the evidence in the light most favorable to the prosecution, [whether] any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* "The relevant question is whether the evidence would permit a jury to find guilty, not whether the evidence requires such a finding." *Commonwealth v. Fisher*, 433 Mass. 340, 342-43 (2001)(further citations omitted). Further, the Commonwealth's position as to proof had not

deteriorated after it closed its case. *Commonwealth v. Lydon*, 413 Mass. 309 (1992).

The Commonwealth's case was a strong circumstantial case. "Circumstantial evidence is sufficient to establish guilt beyond a reasonable doubt." *Commonwealth v. Miranda*, 458 Mass. 100, 113 (2010), cert. denied, 565 U.S. 1013 (2011). In cases where circumstantial evidence was introduced, appellate courts have "never required that every inference be premised on an independently proven fact; rather, [they have] permitted, in carefully defined circumstances, a jury to make an inferences based on an inference to come to a conclusion of guilt or innocence." *Commonwealth v. Dostie*, 425 Mass. 372, 376 (1997). So long as an inference is not "speculative on the evidence," a jury is permitted to draw one inference based on another inference. *Id.* at 372. With regards to probative value, there is no difference between direct and circumstantial evidence. *Id.*

The Commonwealth was not required to eliminate "every reasonable hypothesis of innocence, provided the record as a whole supports a conclusion of guilt beyond a reasonable doubt." *Commonwealth v. Merola*,

405 Mass. 529, 533 (1989). The jury is free to draw any inferences from the evidence that are reasonable and possible; the inferences need not be necessary or inescapable. *Commonwealth v. Whitman*, 453 Mass. 331, 345 (2009). Further, "[t]o the extent that conflicting inferences are possible from the evidence, it is for the jury to determine where the truth lies." *Commonwealth v. Wilborne*, 382 Mass. 241, 245 (1981)(further citations omitted).

The Commonwealth need not prove that no one else could have committed the murder. *Commonwealth v. Casale*, 381 Mass. 167, 175-176 (1980). "The absence of direct proof by way of an eyewitness who saw the defendant shoot the victim[] is not damaging to the Commonwealth's case so long as there is competent circumstantial evidence that establishes the defendant's guilt. . . beyond a reasonable doubt." *Commonwealth v. Cohen*, 412 Mass. 375, 380 (1992).

In sum, the jury heard that on the evening of February 24, 2000, Rose heard the defendant told the victim that he wanted him to get his car on the road, and the victim apologized. (2/153) The defendant told the victim, "I ought to slap your face," and kept repeating to the victim, "that's what I mean." (2/153)

The victim worked as a drug dealer for the defendant. (2/170) Rose left, and the defendant and the victim were alone in the house. (2/157) Rose observed the defendant's car at the house. (2/157)

At 10:15 P.M. that evening, the neighbors heard multiple gunshots and a car speeding away. The CSLI locations and the times of calls corroborated the Commonwealth's position that the defendant shot the victim and left for Fall River. (5/777)

The victim's body was found in a tipped-over chair, which he was observed sitting in earlier. (2/161) The victim was shot five times from a .38 caliber revolver, the defendant had access to a revolver, and he was observed with a revolver in the month prior to the homicide. (4/580, 659) The blood spatter indicated that the shots to the victim were from the same plain. (4/587) Rose observed the defendant earlier that evening, sitting in a seat across from the victim. The defendant was the last person seen with the victim.

The defendant drove that evening to his girlfriend's house in Fall River. He was wearing all black clothing, and Rose observed him wearing black clothing earlier that evening. The next day, after

his mother called him early in the morning, the defendant told Brantley that he returned home that night at 8 P.M. (3/479) Brantley stated that this time was not accurate, and he returned home later that evening. Moreover, a month after the homicide, the defendant made a statement that he shot the victim to a fellow inmate during an argument at the house of correction. (4/739)

The defendant overlooks the fact that he was the last person seen with the victim, had an argument with him a couple of hours before he was murdered, and the CSLI of his phone was consistent with the time the victim was shot and the location of travel leaving the area that night. Compare *Commonwealth v. Webster*, 480 Mass. 161 (2018)(defendant convicted of first degree murder based on circumstantial evidence, including CSLI evidence of his cellphone traveling from Cape Cod to Boston after the time of the homicide).

The defendant compares this case to *Commonwealth v. Curtis*, 318 Mass. 584, 585 (1945). This case is factually distinguishable, where, in the immediate case, the location of the defendant was known on the evening of the homicide, the defendant was with the victim shortly before the murder, and the defendant

told his girlfriend he was home that evening at 8:00 P.M., when the evidence was to the contrary.

Where viewing the evidence under the *Latimore* standard, the defendant cannot succeed on this claim where there was a strong circumstantial case against the defendant.

II. THE DEFENDANT WAIVED HIS CLAIM THAT THE COURT VIOLATED HIS RIGHT TO A PUBLIC TRIAL WHEN HE FAILED TO OBJECT DURING THE VOIR DIRE, HOWEVER EVEN REVIEWING THE CLAIM, IT DID NOT RISE TO A SUBSTANTIAL LIKELIHOOD OF A MISCARRIAGE OF JUSTICE, AND INDIVIDUAL VOIR DIRE OF THE ENTIRE VENIRE WAS NOT REQUIRED.

The defendant asserts that the judge should have included the defendant and his counsel in the lobby during the conversation with juror 2-7, where the record reflects he did not object to this arrangement. The defendant also claims that the judge did not adequately address alleged premature deliberations. (D.B.36) Lastly, the defendant claims that the judge should have inquired of juror 1-5, where 1-5 was concerned that her son was staying in the same house of correction as witness Ryan Ferguson.

A. Defense counsel did not object to the questioning of juror 2-7 in camera, therefore this claim is waived.

Juror 2-7 alerted a court officer on the third day of trial, prior to deliberations, that she was

biased and was concerned about her ability to be a juror. (3/320) The judge indicated he was going to inquire of the juror in his lobby, and defense counsel did not object. (3/321)

THE COURT: Mr. Segadelli?

DEFENSE: No comment at this time. After inquiry perhaps.

THE COURT: All right. I will speak with the juror. The juror has been instructed not to discuss her feelings with any other jurors. I'll ask her also -- obviously inquire about that. And thereafter, I or the court reporter will advise you of the results of this.

DEFENSE: We're not going to sit in on that inquiry?

THE COURT: No. But you certainly -- I'll give it to you verbatim. I'll have the court reporter --

DEFENSE: I'm sure you're aware of the article printed this morning as well, Your Honor. You'll make the usual inquiry in the morning about reading --

THE COURT: I was aware of the article. And I will. Absolutely. No problem.

Defense: Thank you.

(3/321)

The Commonwealth does not dispute that when a judge makes an inquiry about a consequential matter the defendant is entitled to be present with his attorney. *Commonwealth v. Angiulo*, 415 Mass. 502, 530 (1993). The defendant, however, may waive this right. If the defendant does not make a request to be present, and there is no objection by counsel for their absences, then "the issue is waived and the court will not address it on appeal." *Commonwealth v. Dyer*, 460 Mass. 728, 738 (2011).

The defendant's claim is waived. Trial counsel did not object when the judge informed all parties he was going to question juror 2-7 in his chambers without counsel present. "A defendant must raise a claim of error at the first available opportunity." *Commonwealth v. Randolph*, 438 Mass. 290, 294 (2002). *Commonwealth v. MacDonald* (No.1) 368 Mass. 395, 400 (1975)(court found that because the defendant failed to object to his absence from private interviews with the jurors, he was precluded from raising the issue on appeal). Here, the attorney did not object, therefore, the claim is procedurally waived. *Commonwealth v. Morganti*, 467 Mass. 96, 102 (2014).

In *Commonwealth v. Robichaud*, 358 Mass. 300 (1970), the defendant filed a motion for mistrial based on witnesses' statements that they overheard three jurors discuss the case and then express the opinion that the defendant was guilty. *Robichaud*, at 303. The hearing on the motion was held in the judge's lobby without the defendant. Robichaud's counsel clearly objected to the judge's action in allowing the hearing to proceed in the defendant's absence. *Id.* On appeal, the court held that a defendant has a constitutional right, under art. 12 of

the Declaration of Rights, to be personally present at a voir dire hearing conducted during his trial on the question of juror misconduct, and exclusion of the defendant *over his objection* was reversible error. *Robichaud*, at 301-302.

However, here, no such objection was raised. The defense attorney assented to the procedure, therefore the defendant's claim is procedurally waived and he cannot succeed.

B. The defendant cannot establish a substantial likelihood of a miscarriage of justice when the judge questioned juror 2-7 in his lobby.

Even addressing this claim on the merits, the defendant cannot succeed. Whether a defendant and his attorney must be present during the inquiry of a juror has been addressed by the Supreme Judicial Court. Where the defendant does not object, the court reviews for a substantial likelihood of a miscarriage of justice. *Dyer*, 460 Mass. at 735 fn.7.

The defendant now asserts that counsel and the defendant should have been present during the hearing. "The absence of the defendant from such a colloquy, however, does not automatically constitute reversible

error." See *Commonwealth v. Hicks*, 22 Mass. App. Ct. 139, 147 (1986).

This case is similar to *Commonwealth v. Dyer*, 460 Mass. 728 (2011). In *Dyer*, the defendant and his counsel, along with the prosecutor, were excluded from a sidebar where a juror indicated a possibility he might recognize the defendant from his employment as a cook at MCI-Framingham. *Id.* at 737. Counsel was present for a sidebar later, when the juror indicated he recognized the defendant. *Id.* at 737-738.

As in the immediate case, the *Dyer* court reporter transcribed the first sidebar and relayed the conversations to counsel. *Id.* at 737 fn.11. The Court found that the defendant, making no objection, waived his right, and moreover, waived the issue on appeal. *Id.* at 738. Even if the inquiry involves a consequential matter, the defendant's absence does not constitute reversible error. *Id.* at 738-739. Compare *Robichaud*, 358 Mass. at 303 (reversal required where defendant was excluded from voir dire of juror over his objection).

As in *Dyer*, the transcript was read back to the parties. Even after the transcript was read, there was no request or objection on the record for defense

counsel to enter the chambers for the further questioning of the juror. (3/321-324) Juror 2-7 was excused. (3/340)

This case is distinguishable from *Commonwealth v. Anguilo*, on which the defendant relies. 415 Mass. 502 (1993). *Anguilo* involved the exclusion of the defendant and his counsel for multiple juror interviews regarding possible juror intimidation by the defendant during a murder trial that involved a complex federal investigation. Reversal was required due to compounded errors, including impounding the jury list, which are not present in this case.

Where defense counsel failed to object, the defendant cannot establish a substantial likelihood of a miscarriage of justice.

C. The Court did not err where it did not conduct a voir dire of the remaining jurors.

Defense counsel asserts that the judge erred when he did not conduct a voir dire of the remaining jurors. (D.B.35) The defendant requested an individual voir dire, and this Court reviews for abuse of discretion. *Commonwealth v. Reavis*, 465 Mass. 875, 888 (2013).

Whenever a claim of extraneous influence on the jury arises, the trial judge should determine, within his discretion, whether there exists "a serious question of possible prejudice." *Commonwealth v. Tennison*, 440 Mass. 553, 557 (2003) (further citations omitted). If the judge determines such a question exists, he should conduct a voir dire of the jurors. *Tennison*, 440 Mass. at 800.

Here, the judge inquired of the juror:

Q Have you shared at this point your thoughts with any of your fellow jurors?

A Well, about education in general, I have.

Q Education in general?

A Because there is some other educators here.

Q How about the witnesses in this case or what Leticia has or does not have --

A Oh, no, they wouldn't have a clue because --

Q Well, have you told -- have you shared this with them, said anything to them?

A Well, they all noticed the tattoo.

Oh, all right. Have you indicated to them what you believe the tattoo means?

A To one person, yes.

Q Have you spoken to any of the other jurors about your feelings about people not taking advantage of the opportunities given to them in this case?

A As an educator, yes.

Q To other members of the panel?

A Yes, but I -- we were talking in general this morning because I was surprised. Two other people are teachers also.

Q Okay.

A And we had mentioned the decline of student values, morals, et cetera -- parental care.

(3/327-328)

The judge then brought this portion of the conversation to the attention of counsel.

The defense attorney stated,

MR. SEGADELLI: Save my rights. Secondly, I think she said at another point that the poison may have gone beyond one person. She did try and back pedal and say, No, no, we just talked education.

THE COURT: All right. Other than that, she said it was -- she discussed in general with the other teachers -- there are two other teachers on the panel -- the failings of the witnesses in their -- in their view or something. You know, I --

MR. O'KEEFE: Which is quite true.

THE COURT: I won't go any further with that. I will save your rights.

(3/334)

The judge inquired further, specifically asking the juror what she told the other jurors.

Q I would just like to ask you just one further question.

A Certainly.

Q When you told the fellow juror what the mark or tattoo on Leticia's neck meant, what did you tell that juror?

A Basically that it just means -- Le, how can I -- because you really can't take things out of context with Mandarin. That it just means mouth, to the mouth, or repeatedly.

Q Okay. To the mouth or repeatedly?

A Uh huh.

(3/340-341)

It was reasonable for the judge to determine that voir dire of the entire jury venire was unnecessary, where the juror talked about education with other jurors and an interpretation of a tattoo. See *Commonwealth v. Mendes*, 441 Mass. 459, 477 (2004) (judge did not abuse discretion in declining to investigate juror's claims of another juror's bias); see also *Commonwealth v. Francis*, 432 Mass. 353, 370 (2000) (declining to disturb judge's refusal to conduct individual voir dire of all jurors after single juror excused for expressing fear of harassment from gang members); *Tennison*, supra at 560 (deferring to judge's determination that second voir dire of all jurors unnecessary after single juror dismissed for communicating with defendant). Had the judge conducted the voir dire of all jurors, he would have created a risk of possible prejudice by causing concern among the jurors, where there was none. *Francis*, 432 Mass. at 370.

The defendant relies on *Commonwealth v. Martino*, 412 Mass. 267 (1992) (D.B.35). There is no merit to the defendant's claim, where *Martino* involved the discharge of a deliberating juror and subsequent voir dire, a decision that involves different

considerations than those on day three of the trial when deliberations have not begun. See *Commonwealth v. Olszewski*, 416 Mass. 707, 721-722 at fn.15 (1993).

The judge addressed this issue with a sound exercise of his discretion. The judge gave the jury a strong instruction, indicating that they are to keep an open mind, to not discuss the case, and to not read about the case until the conclusion of their jury service. (3/554) After this instruction, the judge appointed a foreperson for the remainder of the trial. (3/554) This procedure was the same process upheld in *Commonwealth v. Alicea*, 464 Mass. 837 (2013). "The judge's decision to deal with the issue by giving a pointed instruction about the need to keep an open mind throughout the trial and by appointing the foreperson early in the trial to help monitor the jurors reflects a sound exercise of discretion." *Alicea*, 464 Mass. at 849. The judge did not abuse his discretion by not holding an individual voir dire mid-trial.

D. Juror 2-7 did not participate in premature jury deliberations with other jurors, however, the judge took adequate steps to address this issue, where he appointed a foreperson and gave a strong instruction to the jury about discussing the case.

The defendant asserts that "Juror 2-7 provided unequivocal proof of premature discussions." (D.B.39) Prohibiting premature jury deliberations safeguard a defendant's right to trial before an impartial jury, however, "not all premature jury discussion about a case will compromise a defendant's fair trial rights." *Commonwealth v. Philbrook*, 475 Mass. 20, 30 (2016)(further citations omitted). Here, the statements by Juror 2-7 do not reflect impermissible jury deliberations warranting a new trial. Compare *Commonwealth v. Smith*, 461 Mass. 438, 443 fn.10 (2012)(jurors comments that they were bored by one of the Commonwealth's witnesses did not reflect impermissible deliberations on the substance of the case) See *Commonwealth v. Maldonado*, 429 Mass. 502, 506-507 (1999) (no abuse of discretion where, after learning of extraneous influence on jury discovered during trial, judge removed offending juror but found that rest of jury remained impartial and gave curative instruction).

Further, the judge gave the jury a strong, pointed instruction at the end of the day:

Members of the jury, please remember my four admonitions. Keep an open mind. Don't discuss the case with anybody until you have completed your jury service. Don't discuss the case among yourselves. Some information has come to me that the jury was discussing the matter. Again, I think it's very important -- not essential, but very important that you do not. Wait until you have heard the entire case. Do not read anything about the case, look at anything about the case, or listen to anything about the case until you have completed your jury service.

(3/553-554)

Compare *Commonwealth v. Philbrook*, supra at 31-32

(where judge gave strong instruction after dismissal of juror, holding no abuse of discretion in refusing to grant mistrial).

Where the judge gave a strong instruction (3/553-554), appointed a foreperson (3/554), and the juror's comments did not rise to the level of impermissible statements, the defendant cannot succeed on this claim.

E. The judge did not abuse his discretion by not holding a voir dire of juror 1-5, who told a court officer she was concerned that her son was held at the house of correction and a witness could "get to her son," where there was no information about her identity provided to the witnesses, and the jury questionnaires were private.

The defendant asserts that the judge should have held a voir dire of juror 1-5. The defendant cannot succeed on this claim. As discussed, *supra*, it has consistently been held that "[t]he determination of potential juror prejudice is a matter within the sound discretion of the trial judge." *Commonwealth v. Federici*, 427 Mass. 740, 747 (1998). The judge will conduct individual voir dire if "there exists a substantial risk of extraneous influence[] on the jury." *Commonwealth v. Boyer*, 400 Mass. 52, 55 (1987).

Juror 1-5 informed a court officer that she had a son at the house of correction, and she was concerned that witness Ryan Ferguson, who was also at the house of correction, might "get to her son." (3/556) The juror did not disclose the fact that her son was an inmate on her juror questionnaire. (3/556)

The judge, defense counsel, and prosecutor discussed this issue in the lobby. (3/556) The judge noted that the juror did not indicate that her

impartiality would be affected. (3/557) The judge initiated steps to address the juror's concerns. The judge directed the Commonwealth to notify the house of correction of the juror's concerns regarding her son's safety. Further, the judge told the court officer to inform the juror that "they will take extra precautions," and also tell the juror in regards to her personal information, that "no one knows what is on those jury questionnaires." (3/558) There was no objection from defense counsel on the proposed procedure to address this issue. The judge was well within his discretion when he did not conduct a voir dire of juror 1-5.

III. THE EVIDENCE OF LETT AND ELLIS DRIVING THE VICTIM TO PURCHASE MARIJUANA FROM THE DEFENDANT AT HIS HOME IN FALL RIVER WAS NOT INADMISSIBLE EVIDENCE OF PRIOR BAD ACTS, WHERE THE EVIDENCE WAS PERMISSIBLE AS IT WAS RELEVANT TO THE DEFENDANT'S MOTIVE TO SHOOT THE VICTIM.

A. Standard of Review.

This Court reviews the admission of prior bad acts under the heavy standard of an abuse of discretion. "We leave it to the judge's sound discretion whether the probative value of the evidence outweighs the risk of unfair prejudice." *Commonwealth v. Walker*, 460 Mass. 590, 613 (2011). "Balancing the

probative value of evidence against its possible prejudicial impact is a task committed to the discretion of the judge." *Commonwealth v. Jackson*, 388 Mass. 98, 103 (1983). This Court asks only whether the judge made a clear error of judgment in weighing the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives. See *L.L. v. Commonwealth*, 470 Mass. 169, 185 n.27 (2014).

B. The evidence of Lett and Ellis driving the victim to purchase marijuana from the defendant was admissible, as the defendant shot the victim motivated by anger that he could not drive himself to pick up drugs.

The defendant asserts that the Commonwealth entered improper prior bad act evidence. (D.B.40) Here, the Commonwealth was permitted to introduce the evidence as it went to motive. Evidence that a defendant previously has misbehaved, indictably or not, is admissible to show "a common scheme, pattern of operation, absence of accident or mistake, identity, intent, or motive." *Commonwealth v. Helfant*, 398 Mass. 214, 224 (1986).

The Commonwealth's theory was that the shooting of the victim was motivated by anger. (6/931) The jury heard evidence from which they could infer that the

shooting was motivated by the anger that the victim, a "bodyguard" for the defendant, was no longer able to drive to Fall River and pick up drugs. (2/153) The defendant's participation in the drug dealing provided motivation for the shooting. The judge strongly instructed the jury that the drug dealing evidence was for the limited purpose of establishing motive and not for the forbidden purpose of inferring bad character. (3/499)

Here, the evidence that Lett and Ellis had to drive the victim to Fall River to purchase marijuana from the defendant was clearly evidence of motive. Rose overheard a discussion between the defendant and Figueroa hours before the homicide, where the defendant was angry that Figueroa had not registered his car. (2/153) The Commonwealth argued that the defendant's motive for shooting the victim was because of anger, in part because the victim was no longer able to drive to Fall River, as his car was unable to be registered and he had to rely on strangers to drive him to Fall River. (6/931-933) See *Walker*, 460 Mass. 590 (2011)(no abuse of discretion to admit evidence of defendant's drug dealing where it was germane to the motive to kill the victim); see also *Commonwealth v.*

O'Laughlin, 446 Mass. 188 (2006) (judge properly admitted evidence of the defendant's drug use on the night of the murder and evidence of his attempts to obtain more drugs, as evidence of motive); *Commonwealth v. Horton*, 434 Mass. 823, 828 (2001) (no abuse of discretion to admit evidence of the defendant's drug dealing and prior plans to rob banks since acts were relevant to show motive).

Moreover, the judge took careful steps to eliminate any possibility of prejudice from the drug evidence. The judge instructed the jury that the bad act evidence was not to be admitted "for the purposes of showing his bad character or propensity to commit the crime charged." (3/499)

Prior to the final jury instructions, the judge asked defense counsel if he wanted to have the *Commonwealth v. Helfant* instruction read again. 398 Mass. at 226. (6/905) The judge noted that this instruction could emphasize the prior bad acts, and also, that it gives the state of the law. (6/905) Defense counsel stated, "I would prefer you not read it again, Judge." (6/905) See *Helfant*, 398 Mass. at 226 (judge gave "strong and forceful" limiting instructions, and "we must presume the jury followed

them"); *Commonwealth v. Chartier*, 43 Mass. App. Ct. 758, 765 (1997) (no risk of miscarriage of justice where limiting instruction for prior bad act evidence was forceful and to point). Juries are presumed to follow instructions. See *Commonwealth v. Correia*, 65 Mass. App. Ct. 38 (2005) n.8

Here, the evidence of the victim purchasing drugs from the defendant in Fall River was properly admitted to show motive. The jury was properly instructed, and the defendant cannot succeed on this claim.

IV. THE COMMONWEALTH'S CLOSING ARGUMENT WAS PROPER, WITHIN THE PERMISSIBLE LIMITS OF CLOSING ARGUMENT, DIRECTLY RESPONDED TO THE DEFENDANT'S CLOSING ARGUMENT AND DID NOT ARGUE FACTS NOT IN EVIDENCE.

A. Standard of Review.

The defendant now alleges that the Commonwealth's closing argument was improper and referred to facts not in evidence. As defense counsel did not object to the closing argument, this issue is not preserved, so the Court reviews for a substantial likelihood of a miscarriage of justice. *Commonwealth v. Penn*, 472 Mass. 610, 626-627 (2017).

B. The Commonwealth's closing argument was based on facts in evidence and reasonable inferences therefrom.

The challenged statements are reviewed in light of the record as a whole, the closing arguments in their entirety, and the judge's instructions in order to determine if any errors possibly made a difference in the jury's conclusions. *Commonwealth v. Worcester*, 44 Mass. App. Ct. 258, 268 (1998). A reviewing court recognizes that closing argument is identified as argument, instructions from the judge informing the jury that closing argument is not evidence may mitigate any prejudice. *Commonwealth v. Dugay*, 430 Mass. 397, 403 (1999).

"[P]rosecutors are entitled to marshal the evidence and suggest inferences that the jury may draw from it." *Commonwealth v. Tassinari*, 466 Mass. 340, 355 (2013). Those inferences "need only be reasonable and possible, not necessary or inescapable." *Correia*, 65 Mass. App. Ct. at 31. Counsel may suggest as to what conclusions the jury should draw from the evidence. *Commonwealth v. Ferreira*, 381 Mass. 306 (1981).

The defendant claims for the first time that the prosecutor committed misconduct by stating in his closing argument:

Figueroa was a drug dealer for Mr. Robinson. He went to Fall River to Shalonda's house on a regular basis to get drugs. Mike Ellis and Dan Lent tell us that. And Figueroa acted as a bodyguard for Smooth, interceding even when Smooth was being challenged by the boyfriend of a girl who he decided he wanted.

(6/932)

The prosecutor's statement must be taken in context. The argument continues on the previous statement:

[a]nd after Figueroa did Mr. Robinson's dirty work for him by beating up Ryan, the guy who was saying, What -- you know, what's up? What are you going after my girlfriend for in my own house?

(6/932)

Each statement in the challenged portion of the closing is based in fact.

The statement, "Figueroa was a drug dealer for Mr. Robinson. He went to Fall River to Brantley's house on a regular basis to get drugs" was based on the evidence. (6/932) Rose testified that her boyfriend, Figueroa, sold drugs. (2/170) As discussed supra, Lent stated that he drove the victim to Fall

River "a lot" to get drugs. (4/648) Ellis also stated that he drove the victim to Fall River to get drugs. Ellis and Lent described the location of where the drugs were purchased. (2/307-309, 4/651) Brantley testified that the defendant stored and sold drugs out of her apartment. (3/498)

The defendant also challenges, "[a]nd Figueroa acted as a bodyguard for Smooth, interceding even when Smooth was being challenged by the boyfriend of a girl who he decided he wanted. (6/932)

Referring to Figueroa as a bodyguard is also based in fact and reasonable inferences. Ferguson yelled at the defendant after overhearing him make comments about his girlfriend. Figueroa, who was not involved in the conversation, then stood up and "sucker punched" Ferguson in the face, and continued hitting Ferguson while the defendant stood there watching. (3/504-505, 3/404, 3/390) Moore explained this concept to Ferguson, that "his [Ferguson's] problem was with Smooth, not Eddie." (3/410)

Nevertheless, even were there some error in the closing argument, there was no objection at trial (6/17:65), and thus the issue is "whether the prosecutor's statements are such that they create a

substantial likelihood of a miscarriage of justice." *Commonwealth v. Marquetty*, 416 Mass. 445, 450 (1993). The remarks are analyzed "in light of the entire argument, as well as in light of the judge's instruction to the jury and the evidence at trial") (internal quotations and citations omitted).

The jury was instructed twice that closing arguments are not evidence. (1/44, 6/907) Jurors are presumed to follow the court's instructions. See *Correia*, 65 Mass. App. Ct. 38 n.8. Jurors are "presumed to recognize that the prosecutor is an advocate, not a witness," *Commonwealth v. Mitchell*, 428 Mass. 852, 857 (1999), and they may be expected "to some degree, to discount [the prosecutor's] remarks as seller's talk." *Commonwealth v. Coleman*, 366 Mass. 705, 714 (1975).

Accordingly, considering the argument as a whole (to which the defendant did not object), the judge's forceful instructions to the jury, and the evidence produced at trial, the isolated remarks were not so inflammatory or unfair as to create a substantial likelihood of a miscarriage of justice.

V. THE INTERESTS OF JUSTICE DO NOT REQUIRE A NEW TRIAL.

Under G.L. c. 278 §33E, this Court has the obligation to review the whole case to determine whether there has been any miscarriage of justice in convicting the defendant of murder in the first degree. *Commonwealth v. Kilburn*, 426 Mass. 31, 38 (1997). The defendant shot the victim out of anger with his car not being properly registered and having to rely on other individuals to pick up drugs in Fall River. The defendant shot the victim while the victim was seated, then stood over him and fired one more shot into his head when he was lying on the ground. The Court should decline to exercise its extraordinary power under G.L. c. 278, §33E as the defendant's conviction for first degree murder is the only verdict consonant with justice.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Honorable Court affirm the conviction and decline to exercise its powers pursuant to G.L. c. 278, §33E.

Respectfully submitted,
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March 4, 2019

STATUTORY ADDENDUM

G.L. c. 265, § 1. Murder defined.

Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree. Petit treason shall be prosecuted and punished as murder. The degree of murder shall be found by the jury.

G.L. c. 256/15A(b). Assault and Battery with a Dangerous Weapon.

Whoever commits an assault and battery upon another by means of a dangerous weapon shall be punished by imprisonment in the state prison for not more than 10 years or in the house of correction for not more than 2 1/2 years, or by a fine of not more than \$5,000, or by both such fine and imprisonment.

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS.

Supreme Judicial Court
SJC-08464

COMMONWEALTH OF MASSACHUSETTS,
Appellee

v.

CHARLES ROBINSON,
Defendant-Appellant

M.R.A.P. 16K Certification

I hereby certify that this brief complies with the following Massachusetts Rules of Appellate Procedure: M.R.A.P. 16(a)(13) (addendum); M.R.A.P. 16(e) (references to the record); M.R.A.P. 18 (appendix to the briefs); M.R.A.P. 20 (form of briefs, appendices, and other documents); and M.R.A.P. Rule 21 (redaction).

This brief was composed using Courier New font, size 12, with 10 characters per inch, with 53 non-excludable pages. The Commonwealth's motion to exceed the page limit was allowed by this Court on February 27, 2019.

Signed under the pains and penalties of perjury
this 4th day of March, 2019.

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CERTIFICATE OF SERVICE/CERTIFICATE OF MAILING

I, Elizabeth A. Sweeney, Assistant District Attorney for the Cape and Islands District, hereby certify that I have served a PDF copy of the Commonwealth's Brief to the Clerk of the Supreme Judicial Court, and a copy to defense counsel via TylerHost online service, and two hard, bound copies:

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